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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BLAZE CONSTRUCTION CO., INC.,
Petitioner,

v.

THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the principle that federal contractors are not federal instrumentalities constitutionally immune from state taxes, render the Indian preemption doctrine inapplicable to state taxation of a contractor hired by the Bureau of Indian Affairs (BIA) to construct on-reservation projects for Indian tribes, even though: the BIA is carrying out its unique trust responsibility to act in the tribes' place until they decide to assume the contracting function; the state tax on BIA contractors interferes with federal Indian policy; and the state tax would be preempted had the tribes exercised their statutory right under the Indian Self-Determination and Education Assistance Act to displace the BIA and award the identical federally-funded contract themselves.

2. If the Indian preemption doctrine applies, did *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), modify *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982) by holding that federal Indian laws, regulations and policy are outweighed by the state's general interest in raising revenue, so that a state which provides no services or regulation related to an on-reservation project may tax the contractor constructing that project.

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PETITION FOR A WRIT OF CERTIORARI

Blaze Construction Co., Inc. (Blaze) petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico, No. 21,551, filed October 18, 1994 (App. 1a) is reported at 884 P.2d 803 (1994). The opinion of the Court of Appeals of New Mexico, No. 12,120 filed Sep-

[1] In addition to the captioned parties, ARCO Materials Inc. was a party below in a separate case, N.M. Sup. Ct. No. 22,132, which was consolidated with Blaze's case by the State Supreme Court. During the relevant time period, Blaze Construction Co., Inc. was an Oregon corporation with a single shareholder, Bill Aubrey, a Blackfeet Indian (App. 2a, 18a, 28a). Blaze is now incorporated under the laws of the Blackfeet Nation; Mr. Aubrey continues to be its sole shareholder.

tember 2, 1993 (App. 17a), is reported at 117 N.M. 362, 871 P.2d 1368 (N.M. Ct. App. 1993). The decision and order of the Taxation and Revenue Department of the State of New Mexico issued January 23, 1990 (App. 27a) is unreported.

JURISDICTION

The opinion of the Supreme Court of New Mexico was entered on October 18, 1994 (App. 1a). It became a final judgment upon issuance of the mandate on November 3, 1994 (App. 15a). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1988).

STATUTES AND REGULATIONS INVOLVED

Set forth in the Appendix are pertinent portions of the New Mexico Gross Receipts and Compensating Tax Act, Ch. 7, Article 9, §§ 7-9-4, 7-9-7, N.M. Stat. Ann. (1978); the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 2206, as amended, 25 U.S.C. § 450 1988 & Supp. V 1993 (Self-Determination Act)[2]; and § 126(b) of the Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 2114, 23 U.S.C. § 204 (1988), and relevant portions of regulations of the Bureau of Indian Affairs of the Department of the Interior governing self-determination contracts under the Self-Determination Act, 25 C.F.R. §§ 271.1-271.5 (1994) and Roads of the Bureau of Indian Affairs, 25 C.F.R. §§ 170.1-170.19 (1994).

STATEMENT

This case involves a challenge to gross receipts and compensating taxes assessed by the Taxation and Revenue Department of the State of New Mexico (the Tax Department) on an Indian enterprise that had contracted with the Bureau of Indian Affairs of the Department of the Interior (BIA) to construct Indian reservation roads

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[2] Section 102 was further amended by Title I of Pub. L. 103-413, The Indian Self-Determination Act Amendments of 1994, approved October 25, 1994, 108 Stat. 4250.

located entirely within four Indian reservations. The Supreme Court of the State of New Mexico sustained the assessment. It held that "[b]ecause [Petitioner] contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable and [Petitioner is] subject to state taxes, just as any other federal government contractor would be." (App. 6a-7a). The New Mexico court held, in the alternative, that if the Indian preemption doctrine did apply, this Court had modified that doctrine to give dispositive weight to the state's general interest in raising revenue (App. 12a).

A. The Relevant Federal Statutes

1. *The Indian Self-Determination Act*

The Self-Determination Act has been the dominant expression of the federal government's Indian policy since 1975. The Act's Declaration of Policy provides:

> Congress declares its commitment to . . . the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b), as amended by Pub. L. No. 100-472, § 102, 102 Stat. 2285 (1985).

The substantive provisions of the Self-Determination Act implement this declaration by establishing, as the federal self-determination policy, the right of a tribe to plan, conduct and administer all or parts of any program which the BIA is authorized to administer for the benefit of Indians. 25 U.S.C. § 450f(a). One component of this policy is a tribe's right to choose the degree of involvement it wishes to have in the delivery of the federal government's trust services to it. Under the Act, a tribe may

opt to deliver the services itself (or through a tribal organization such as an Indian school board),[3] using the funds appropriated to the BIA for that function. The tribe does so by entering into a self-determination contract with the BIA setting out how it will deliver those services and the amount of funding it will receive. 25 U.S.C. § 450f(a). Under another option, a tribe may choose to have the BIA provide those services, while the tribe, if it wishes, plans the manner in which the BIA is to operate the program. 25 C.F.R. § 271.4(f). Or the tribe may choose to play no role. If a tribe assumes responsibility for a program, it may at any time retrocede that program to the BIA. 25 C.F.R. § 271.71. Nothing in the Act authorizes termination of the United States' trust responsibility to Indian people. 25 U.S.C. 450n(2).

The regulations implementing the Act provide that: (i) the decision of a tribe to take over a particular function of the BIA through a self-determination contract rests solely with the tribe, 25 C.F.R. § 271.4(d); (ii) self-determination includes the right of the tribe not to deliver the services and instead let the BIA continue to do so, 25 C.F.R. § 271.4(d); and (iii) it is the policy of the BIA not to impose sanctions with regard to a tribe's decision to assume or not to assume responsibility for a particular service or program, or with respect to tribal retrocession of particular BIA functions. 25 C.F.R. §§ 271.4(e) and 271.72(g).

The BIA's regulations, as originally enacted in 1975, excluded individual construction projects from those programs defined as contractible by a tribe under the Act. 25 C.F.R. § 271.12(a)(5). The BIA, however, developed a consistent practice of waiving this exclusion under 25 C.F.R. § 271.51(b), upon request by tribes. In 1988, Congress codified this BIA practice by expressly authorizing tribes to assume the management of construction

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[3] *See Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

projects.[4] When a tribe assumes control over a BIA construction project pursuant to the Self-Determination Act, it, rather than the BIA, becomes the entity that advertises, awards and administers the construction contract.

2. *Indian Reservation Roads Legislation*

Under its general trust obligation to Indians,[5] the United States assists Indian tribes in the development of an infrastructure that will promote economic self-sufficiency. Performance of this trust obligation includes, *inter alia*, the construction of Indian reservation roads (23 U.S.C. § 204),[6] schools (25 U.S.C. § 458) and hospitals (25 U.S.C. § 1631).

Until 1983, Indian roads were constructed with funds appropriated by Congress directly to the BIA for that purpose.[7] In 1983, Congress included the Indian Reservation Road Program in the Federal Lands Highway Program. 23 U.S.C. § 204. Since then, the funds for the roads have come from the Federal Highway Trust Fund, which is financed by the federal gasoline tax. That Fund is managed by the Secretary of Transportation, who transfers monies for Indian roads to the Secretary of the Interior. 23 U.S.C. § 204.

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[4] Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2288 (1988), 25 U.S.C. § 450f (1988).

[5] *See generally, United States v. Mitchell*, 463 U.S. 206, 225 (1983).

[6] "We have a fiduciary responsibility through agreements made long ago with tribal governments to see that Indians have safe and modern infrastructure. Without these facilities, it is impossible for tribes to compete in the area of economic development." 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (Congressman George Miller speaking on behalf of increased funding for Indian Reservation Roads under the Intermodal Surface Transportation Efficiency Act of 1992).

[7] *See, e.g.*, Department of the Interior Appropriations, Pub. L. No. 97-100, 95 Stat. 1391, 1400 (1981).

Although the construction and improvement of Indian reservation roads are subject to the uniform policies of the Federal Lands Highways Program established under 23 U.S.C. § 204, Congress has differentiated Indian projects from highway construction on non-Indian federal lands. Special provision is made for contracts with Indian tribes and the employment of Indian labor. 23 U.S.C. § 204(b). Funds obligated for Indian road projects must be supplementary to and not in lieu of apportionments to states from the Highway Trust Fund. 25 U.S.C. § 204(c). Under 23 U.S.C. § 204(e) (1988), the Buy Indian Act, 25 U.S.C. § 47 (1988), and the Indian preference provision of the Indian Self-Determination Act, 25 U.S.C. §450e(b), apply. The roads, when completed are administered and maintained by the BIA. 25 C.F.R. § 170.6.

The tribes are responsible for setting the "reservation road priorities and considering the merits of one road project over another." 25 C.F.R. § 170.16(c). The regulations also provide that the tribe may contribute to the cost of the road, so long as such contributions will not cause "undue impairment of the necessary tribal functions." 25 C.F.R. § 170.6a.

B. The Blaze Contracts

In 1983, Congress provided funds from the Highway Trust Fund for the construction of Indian reservation roads.[8] The Department of Transportation and the BIA allocated funds for road construction projects on the Jicarilla Apache Reservation, the Zia Pueblo, the Laguna Pueblo, and the Navajo Reservation (hereinafter, "the Tribes"). None of the Tribes chose to exercise their Self-Determination Act option to assume responsibility for the road projects on their reservations. However, each

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[8] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(a)(3), 96 Stat. 2097, 2099 (1983).

of the Tribes took part in the planning for construction of the roads, and contributed rights-of-way (App. 18a).

The BIA issued bid solicitations for each project, stating that each project was a total set aside for small business 100% Indian-owned and controlled firms.[9] Blaze qualifies as an Indian-owned economic enterprise under the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.* (1988) (App. 28a). Blaze submitted bids on each solicitation. Blaze did not include the New Mexico gross receipts tax in the amounts submitted in its bids (App. 29a). Blaze's four bids were accepted by the BIA, and it entered into contracts with the BIA to construct each project.

New Mexico does not license Blaze as a contractor doing business in the State of New Mexico (App. 29a). During the construction period, Blaze was headquartered in Yakima, Washington but maintained a construction office on the reservations at each contract location (App. 28a). The contracts required Blaze to hire members of each tribe upon whose reservation it was constructing a project (App. 29a). In addition to rights-of-way across tribal lands, the Tribes provided water and base materials needed to complete the construction (App. 29a). Blaze purchased liquid asphalt, and rented machinery from off-reservation businesses in New Mexico. It paid the full amount of New Mexico taxes included in the invoices from its off-reservation suppliers (App. 29a).

On May 9, 1986, after Blaze had been selected to perform the work on each of the projects, the Tax Department informed Blaze by letter that it considered the contracts to be subject to New Mexico's gross receipts tax (App. 29a).

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[9] R., Taxpayer's Exhs. 1, 2, 3 and 4.

C. Proceedings Below

1. The Tax Department Assessment and Determination

New Mexico levies an excise tax (4¾ percent during the relevant period) on the gross receipts of any person engaged in the privilege of doing business in the State. N.M. Stat. Ann. § 7-9-4 (Michie 1978) (App. 40a). It also imposes a compensating use tax (4¾ percent during the relevant period) on the value of property or services acquired in transactions that should have been subject to the gross receipts tax or that were later used in the State. N.M. Stat. Ann. § 7-9-7 (Michie 1978) (App. 40a-41a).[10]

The Tax Department issued an assessment to Blaze on February 18, 1988, seeking a total amount of $291,008.53 for the reporting period between April 1, 1986 and October 1, 1987. This amount consisted of $222,409.55 in gross receipts and compensating taxes, $22,240.95 in penalties and $46,358.03 in interest.

Blaze filed a timely protest pursuant to N.M. Stat. Ann. § 7-1-24 (Michie 1978). On January 23, 1990, following an evidentiary proceeding before a hearing officer, the Tax Department rejected the protest. It reasoned that New Mexico could impose the tax because the constitutional doctrine of intergovernmental immunity no longer applies to state taxes on contracts with federal agencies, citing *United States v. New Mexico,* 455 U.S. 720 (1982). Because the contract was with the United States, not with the Tribes, the Tax Department saw "no logical reason to treat the Taxpayer's receipts in this instance any differently solely because the work was performed on an Indian reservation." (App. 33a).

Turning to the Indian preemption doctrine, the Tax Department determined that *Cotton Petroleum Corp. v.*

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[10] At the time of the transactions in question, the gross receipts tax rate in New Mexico was 4 and ¾ percent (App. 40a). It is now 5 percent (App. 40a).

New Mexico, 490 U.S. 163 (1989) expressed a more rigorous formulation of that doctrine than had prior cases. It found no evidence of a specific congressional intent to preempt in the Indian Self-Determination and Education Assistance Act, the Indian Financing Act, or the Federal Lands Highway Program (App. 35a).[11]

2. *Judicial Proceedings*

a. *The New Mexico Court of Appeals.* On Blaze's appeal from the Tax Department, the Court of Appeals of the State of New Mexico reversed, holding that the state's gross receipts tax was preempted (App. 25a).

The court rejected the State's argument that the issue was controlled by *United States v. New Mexico* because Blaze had contracted with the BIA rather than the Tribes. It noted that as a federal agency, the BIA has a special relationship with the Indian tribes with respect to the performance of governmental functions, economic development and the maintenance and enhancement of tribal sovereignty (App. 20a). The court viewed the BIA as a partner with the Tribes in the performance of the governmental function of improving the reservations' transportation systems and facilitating their economic development.[12]

Applying the preemption analysis required by *Cotton Petroleum*, the court then undertook a detailed examina-

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[11] In particular, it concluded that there was nothing in the Federal Lands Highway Program to indicate that taxes that would apply to construction of national park roads should not also apply to Indian roads (App. 35a).

[12] The court specifically noted that "for purposes of Indian preemption analysis, there is no basis for distinguishing between roads maintained by a tribe and roads maintained by the BIA." (App. 20a, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 n.14 (1980)). The court determined, however, that *Bracker* was not dispositive because, in that case, tribal logging activities, not BIA roads, were the basis of this Court's preemption holding. (App. 22a).

tion of the interests and activities of the Federal Government, the Tribes and the State. The court gave weight to the role of the Tribes in providing the rights-of-way, planning the routes, furnishing water and base materials, and making available a pool of workers from the reservations. It found that "[t]he State, on the other hand, did not attempt to identify any interest, either in the form of a planning function or regulatory responsibilities, in the construction projects or the roads themselves after they were built" (App. 19a), leaving the State with no responsibilities related to the four projects (App. 23a).

The court also concluded that the State taxes burden the federal and tribal interests in improving reservation transportation systems and in fostering the economic well being of tribal members (App. 24a). It expressly held that "if contractors such as Blaze are required to pay state taxes on their road-building activities, the cost per mile of building roads on reservations will increase" and therefore, "fewer roads or smaller portions of roads can be built or improved for the same amount of money." (App. 24a).

The court distinguished this case from *Cotton Petroleum's* determination that state severance taxes on Indian oil production leases were not preempted. It held that in *Cotton Petroleum* the State had been able to demonstrate a regulatory interest in the activity being taxed, and provided services to the tribe and lessees, while no comparable interest had been identified on this record (App. 25a).

b. *The New Mexico Supreme Court.* The Supreme Court of the State of New Mexico reversed the State Court of Appeals' decision. It ruled that under the federal instrumentality doctrine set out in *United States v. New Mexico,* Blaze is not protected from state taxes by the constitutional doctrine of intergovernmental immunity. It further held that the Indian preemption doctrine was

inapplicable because the contracts were not made directly with the Tribes or their members, but with the BIA (App. 6a). It rejected the Court of Appeals' holding that the doctrine applied, determining that the BIA and the Tribes were not in partnership in performing the construction contracts.

In the alternative, the New Mexico Supreme Court held that even if the Indian preemption doctrine applied, the tax on Petitioner was not preempted. It held that this Court's decision in *Cotton Petroleum* had abandoned the requirement in *Bracker* and *Ramah* that a state must identify a regulatory function or service related to the activity being taxed. The court ruled that "*Cotton Petroleum* [had] abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*" (App. 11a). The court therefore found it irrelevant that the State identified no specific services or regulatory functions provided to the activity it was seeking to tax (App. 12a). Instead, the court held that the State's interest in taxing for the common good, *i.e.*, the welfare of the general population of the state, was sufficient to justify its imposition of the tax under the Indian preemption doctrine (App. 12a).

The court also concluded that in light of the findings by the Tax Department, no impairment of tribal interests could be shown because any burdens on tribal interests were indirect (App. 13a-14a). The direct burden of the taxes, it held, fell on the federal government rather than on the Tribes (App. 14a).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

This Court has recognized that when the BIA is providing on-reservation facilities and services to Indian people, it acquires a unique legal status that makes it different from ordinary federal agencies because it is executing the United States' trust responsibility to Indians. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Under the policies and procedures Congress prescribed in the 1975 Self-Determination Act, Indian tribes themselves decide whether particular on-reservation functions or services will be performed by tribal governments and organizations, or by the BIA. When a tribe chooses to let the BIA perform a function, the BIA is effectively providing local government services on behalf of the tribe. Under the scheme of the Self-Determination Act, the nature and purpose of a federally-funded contract for such services is the same whether the contract is awarded by the BIA or the tribe. Therefore, the same principles should govern the liability of the contractor for state taxes, whether the agreement is with the tribe or the BIA.

This Court has also ruled that where the trust responsibility to Indians is involved, applicability of state taxes no longer depends on whether there is a constitutional immunity under the federal instrumentalities doctrine, but on whether particular state taxes must yield to federal policy under the Indian preemption doctrine. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 837-38 (1982).[13] That doctrine requires a particularized balancing of tribal, state and federal interests in light of all congressional policies. *Cotton Petroleum*, 490 U.S. at 176. If the Tribes on whose behalf

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[13] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473 n. 113 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-55 (1973).

the BIA contracted in this case had exercised their self-determination option to award the contracts themselves, the taxes would have been preempted under *Ramah*. Because the contracts were let by the BIA, however, the New Mexico Supreme Court held the Indian preemption doctrine inapplicable. This approach produces disparate tax treatment of tribal and BIA contractors performing the identical function, thereby seriously interfering with the policies and purposes of the Indian Self-Determination Act.[14]

The New Mexico Supreme Court held, in the alternative, that the taxes imposed on Blaze were valid under the Indian preemption doctrine. It interpreted *Cotton Petroleum* as holding that under this doctrine, a state no longer need provide any service or regulatory function to the particular on-reservation activities it is taxing, because a state's general interest in raising revenue is sufficient in itself to establish a supervening state interest. However, this interpretation conflicts with *Cotton Petroleum*'s careful analysis of the state's particularized regulatory role in the activity being taxed in that case. It also conflicts with specific holdings in *Ramah*, 458 U.S. at 845, and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980), not overruled by *Cotton Petroleum*, that a general interest in raising revenue is not a sufficient state interest under the Indian preemption doctrine. This ruling also conflicts directly with the Ninth Circuit's post-*Cotton Petroleum* decision in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (1989), *cert. denied*, 494 U.S. 1055 (1990), which held that a state timber tax is preempted because it "does not fund services that directly relate to the harvesting of timber and is otherwise unconnected with tribal timber activities."

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[14] Petitioner claims only that the Indian preemption doctrine applies to BIA contractors, not that such contractors are constitutionally immune from state taxes under the federal instrumentalities doctrine.

Because the decision by the highest court of New Mexico is binding on all tribunals in that State, and contractors are barred by the Tax Injunction Act [15] from challenging New Mexico's gross receipts tax in federal district court, this Court is the sole forum that can address contractors' challenges to the validity of the tax under the Supremacy Clause.

II. THE INDIAN PREEMPTION DOCTRINE SHOULD APPLY TO STATE TAXATION OF BIA AS WELL AS TRIBAL CONTRACTORS HIRED FOR ON-RESERVATION CONSTRUCTION

A. The Federal Instrumentality Doctrine Does Not Foreclose Application of the Indian Preemption Analysis if BIA's Activity Substantially Impacts Federal Indian Policy

The United States is constitutionally immune from direct taxation by the states. Under the federal instrumentality doctrine of *United States v. New Mexico*, however, a state may tax a contractor hired by a federal agency, unless the contractor is a "constituent part" of the agency. 455 U.S. 720, 740 (1982).

By contrast, whether a state may tax a contractor hired by a tribe (even when the tribe has assumed that function from the BIA and is using the BIA's money) is determined under the Indian preemption doctrine. That doctrine requires a detailed examination of the relevant facts and applicable laws, and a careful balancing of Indian, state and federal interests, to determine whether a state's intrusion into Indian affairs so interferes with federal Indian policy or tribal sovereignty that it must be deemed to have been implicitly preempted by Congress. *Cotton Petroleum* (no preemption of State severance taxes on lessees of Indian mineral rights); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (State taxes on school construction contractor hired by tribal organiza-

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[15] 28 U.S.C. § 1341 (1988).

tion which had taken over the contract award function from the BIA preempted.)

Between these two lines of cases lie contracts for on-reservation construction entered into by the BIA in performance of the United States' fiduciary responsibilities to Indian people because the tribe has chosen not to assume responsibility for awarding the construction contract. Petitioner does not contend that it is immune from state taxes under the principles of intergovernmental immunity. However, given the integral role the BIA and its contractors play in the implementation of federal Indian policy, Petitioner does contend that the Indian preemption doctrine should be applied to determine if the state tax improperly interferes with such policy.

B. The BIA is so Integral to the Federal Indian Trust Responsibility that Indian Preemption Analysis Should Apply

1. *The BIA has Unique Trust Responsibilities Towards Tribes and Individual Indians*

This Court has previously noted that the BIA has a different status and different mission from that of any other federal agency. "[T]he legal status of the BIA is truly *sui generis*." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). One of the factors that makes the BIA unique is its responsibility to provide Indians with services normally provided by local governments until the Indian tribes are ready to assume greater control over their own lives. *Id.* at 552 (citing *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). This is the role the BIA is performing when it awards contracts for the construction of Indian reservation roads. These are Indian roads that are provided as part of the federal government's fiduciary duty to the tribes.[16] That is why the BIA

[16] "The Amendment we are offering is quite simple. It strives to finally provide the Indian people with the necessary level of funding to upgrade *their* deteriorating and inadequate road system." 137

regulations empower the tribes to set the road priorities on their reservations, 25 C.F.R. §§ 170.4a and 170.16(c), and permit them to contribute to the cost of the road, if doing so will not impair tribal functions. 25 C.F.R. § 170.6a. Because the BIA is acting as a surrogate on behalf of the tribe, its contractors should be assessed under the same Indian preemption doctrine this Court has applied to tribal construction contractors.

Further, given the integral role the BIA plays in implementing federal Indian policy, state activities that affect the BIA can, and often do, directly affect the tribe and the individual Indians "whose lives and activities are governed by the BIA in a unique fashion." *Mancari,* 417 U.S. at 554. Therefore, whether a state tax interferes with federal Indian policy cannot be fully determined unless the Indian preemption doctrine is applied to those doing business with the BIA as well as to those doing business with tribes and their members.

2. *Application of the Indian Preemption Doctrine to Tribal Contractors But Not to BIA Contractors Interferes With the Congressional Scheme Established by the Self-Determination Act*

In the Indian Self-Determination Act, Congress constructed a comprehensive scheme to promote tribal self-governance without retreating from its trust responsibilities. Under that scheme, the relationship between the BIA and tribes has become even more intertwined. As a result, state taxation of BIA contractors may not only interfere with federal Indian policy, it may also interfere with tribal sovereignty and self-governance, making application of the Indian preemption doctrine even more essential.

Cong. Rec. S7787 (daily ed. June 13, 1991) (emphasis added). (Senator Pete Domenici speaking on behalf of an amendment to increase funding for the Indian Reservation Roads program). *See also* statement by Congressman George Miller, *supra,* n.6.

In the Self-Determination Act, Congress granted to tribal governments the self-governing authority to decide for themselves who shall provide trust services on their reservations, such as the award of contracts for the construction of Indian reservation roads. Under one option, the tribe lets the BIA award the road construction contract directly, pursuant to the procedures set out at 25 C.F.R. Part 170 and the Federal Acquisition Regulations, 48 C.F.R. §§ 1401-99 (1993). In such cases, the tribes may exercise their self-determination rights by participating in the planning of the project (25 C.F.R. § 271.4(f)), as happened in this case (App. 18a).

Under a second option, the tribe notifies the BIA that it wishes to assume responsibility for awarding the road construction contract. The Secretary and the tribe then enter into a separate self-determination contract which provides for the transfer to the tribe of funds for and control over that road project. The tribe then awards and administers the construction contract itself.[17]

The decision on which method to use rests solely with the tribe, as an exercise of its self-determination rights. 25 C.F.R. § 271.4(d). The decision not to assume responsibility for the project and to let the BIA award the construction contract is as much an act of self-determination as is assuming responsibility. 25 C.F.R. § 271.4(d). Likewise, if, after assuming responsibility for the activity, the tribe concludes that the task is too burdensome, it has the right to return or "retrocede" that responsibility to the BIA. 25 C.F.R. § 271.71 (see discussion, *supra*, p. 4).

The BIA Self-Determination regulations also recognize that the extent to which individual tribal governments are able to participate in the planning, conduct and adminis-

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[17] Until 1994, a tribe was required to comply with the same Federal Acquisition Regulations as the BIA. The 1994 amendments to the Self-Determination Act relax this requirement. The Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4253.

tration of road construction programs varies with the size and resources of the Indian community involved and the experience of tribal officials in administering such programs. Indian governments frequently lack the human and economic resources, or the business experience necessary to assume administration of contracts heretofore administered by the BIA. To avoid pushing a tribe into assuming the federal government's on-reservation trust functions before the tribal government decides it is ready to do so, the regulations provide that the BIA is to impose no incentives or disincentives that could drive that decision. 25 C.F.R. § 271.4(e). The federal government has thus committed itself to complete neutrality in order to avoid influencing a tribe when it chooses among its self-determination options.

Thus, under the Act, Congress has established a comprehensive scheme for promoting tribal self-determination. As part of that scheme, it has made the roles of the BIA and the tribe largely interchangeable, so that BIA management and tribal management of a road construction project are virtually two sides of the same coin. In fact, on any roads project, responsibility for the project can move from the BIA to the tribe and back to the BIA. 25 C.F.R. § 271.71.

Congress has, in effect, made the BIA an optional resource for the tribes. The fact that the BIA has awarded and is managing a particular road construction contract results from an explicit or implicit governmental decision, made solely by the tribe, not to perform the function itself. This decision is specifically recognized as an exercise of self-determination. By incorporating the neutrality principle discussed *supra*, this federal policy leaves no room for non-tribal influences to tilt the tribes' decision-making in one direction or the other.

A state tax on a BIA contractor injects the state into the middle of this comprehensive scheme. Further, in light of the existing case law, the state's intrusion signifi-

cantly upsets the careful balance Congress has struck between the promotion of self-government, and assurance to tribes that the federal trust responsibility continues to give them the right to receive services directly from the BIA when they so choose. 25 U.S.C. § 450n(2).

It is now well established that state governments may not tax tribal governments and Indian organizations engaged exclusively in transactions for the benefit of tribal members on the reservation,[18] nor may states tax on-reservation contractors in direct privity with Indian tribes.[19] For example, in *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), an Indian school board assumed the BIA's construction functions, so that the Board, rather than the BIA, awarded the federally-funded contract for construction of an on-reservation school. Applying the Indian preemption analysis, this Court held that the contractor was exempted from State taxation.

Thus, if Zia and Laguna Pueblos, the Jicarilla Apaches or the Navajo Nation had assumed administration of the BIA road construction contracts involved here and awarded the identical contracts, Petitioner would not have been subject to the New Mexico gross receipts tax. Yet solely because the Tribes chose to let the BIA award the contracts, the New Mexico Supreme Court's decision makes Petitioner subject to that tax.

In light of the New Mexico Supreme Court's decision, BIA contractors will henceforth include state taxes in calculating their bids on BIA-awarded contracts. In order

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[18] *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

[19] *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

to preserve limited funds appropriated to fulfill the federal trust responsibility, tribes will be under pressure to take over the function of contracting for such construction, whether they are fully ready to do so or not. Otherwise, they will get fewer miles of roads and smaller hospitals and schools when the BIA awards the contract, because a substantial percentage of the funds will be diverted for state taxes. Since the annual appropriations for Indian construction projects is approximately $655 million a year,[20] the impact is substantial.

Unlike situations considered under the federal instrumentality doctrine, here the effect on federal interests goes far beyond that of just increasing the cost to the U.S. Treasury. The state tax becomes a significant and disruptive factor in the federal government's self-determination policy. BIA and tribal award of road projects are no longer interchangeable. The state tax burdens one of the tribe's options, which conflicts with a federal policy that tribal decision-making be free of outside influences. State tax consequences will also confuse the situation when a tribe seeks to retrocede a contract to the BIA.

These kinds of state burdens may or may not be sufficient to justify preemption in a particular case; that will depend on a court's balancing of the various interests under the Indian preemption doctrine. However, this case demonstrates how state actions in regard to BIA contractors substantially affect not just federal Indian policy, but tribal sovereignty and self-governance as well. Unless Indian preemption analysis is applied to state taxation of BIA contractors, the courts will never have the opportunity to determine if such burdens are inconsistent with Congressional intent and thus preempted.

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[20] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, 107 Stat. 1379, 1393 and 1409 (1993); Intermodal Surface Transportation Efficiency Act of 1991, 105 Stat. 1914, 1919 (1991).

C. There Is No Support in the Caselaw or Underlying Policy for Threshold Criteria That Apply the Indian Preemption Analysis Only to Cases in Which the Tribe is a Direct Party

The New Mexico Supreme Court concluded that the Indian preemption doctrine is to be applied only when a tribe or an individual Indian is a direct party. It did so on the grounds that all of this Court's Indian preemption decisions involved "cases in which contracts were made or business was conducted directly with Indian tribes or tribal members." (App. 6a).

In so holding, the New Mexico Court has created threshold criteria for the Indian preemption doctrine that have no support in the caselaw. There is no language in any of the Court's decisions indicating that the Indian preemption doctrine applies only when the tribe or tribal member is a party to the contract. Nor is such a threshold requirement consistent with the purposes of the doctrine. The preemption analysis is "essentially legislative in character," [21] designed to determine whether a particular state action is inconsistent with Congress' intent. There is no room for artificial threshold criteria in such an inquiry. Far from adopting any mechanically applied threshold criteria, this Court has said that to ascertain Congress' intent, there must be a "flexible," "sensitive," "particularized" analysis of the federal, tribal and state interests involved.[22] This Court should address the New Mexico court's mischaracterization of the Indian preemption doctrine.

The principles for determining the validity of state taxation of on-reservation contractors are of substantial public importance. They concern not only the 21 tribal govern-

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[21] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (quoting *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-66 (1949)).

[22] *Id.* at 176.

ments and the 87,000 Indians in New Mexico's pueblos, reservations and trust lands, but all of the nation's Indian tribal governments and their peoples. In *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 842 (1982), this Court concluded that the burden of state taxation of a contractor fell directly on the tribe because such taxes depleted federal funds available for the construction of Indian schools. *See Cotton Petroleum*, 490 U.S. at 183-85. Similarly, the limited funding allocated for construction of Indian facilities on particular reservations will, as the New Mexico Court of Appeals recognized, be diminished if BIA contractors must include such taxes in their bids.

The proper standard for the taxation of receipts from those contracts is also of immediate importance to the states, which understandably wish to exploit federal funds as a source of revenue. In addition, the question bears directly on the federal trust responsibility, for federal agencies like the BIA must administer the limited funds allocated to construction for the benefit of Indians. Therefore, the applicability of the Indian preemption analysis to state taxation of BIA contractors for on-reservation construction is a question that merits prompt resolution by this Court.

III. UNDER THE PREEMPTION ANALYSIS IN *COTTON PETROLEUM*, THE STATES ARE PREEMPTED FROM IMPOSING GROSS RECEIPTS TAXES ON BIA CONTRACTORS THAT CONSTRUCT FACILITIES ON RESERVATIONS FOR THE BENEFIT OF INDIANS

Cotton Petroleum restated the general principles governing Indian preemption analysis. First, tribal sovereignty serves as a backdrop to the examination of Congress' intent. Second, preemption principles developed in non-Indian cases are not applicable, nor is the analysis "controlled by 'mechanical or absolute conceptions of state

or tribal sovereignty.' " [23] Rather, the courts must undertake a particularized review of the facts, legislation, and the relevant state, federal, and tribal interests. Third, the broad policies of the relevant legislation and the history of tribal independence are directly relevant. Fourth, Congress need not expressly declare its intent for preemption to occur. Finally, ambiguities in federal legislation affecting Indians are typically "resolved in favor of tribal independence." [24]

Carefully applying these principles, this Court held in *Cotton Petroleum* that New Mexico's mineral severance tax applied to production from oil and gas leases on an Indian reservation. The Court first determined that the Indian Mineral Leasing Acts of 1927 and 1938 were consistent with a congressional purpose to permit state taxation of non-tribal mineral lessees. It then compared the interests of the State and the Tribe. As to the State, the record showed that New Mexico, in fact, provided substantial support and regulatory services to the lessees' operations being taxed. As to the Tribe, the record showed that no economic burden fell on the Tribe, and that any adverse effects on oil and gas development by Indian tribes were marginal, insubstantial and indirect. The Court concluded that the most significant difference between the facts in *Bracker* and *Ramah,* and those in *Cotton Petroleum* was that, in the latter, the State had a significant regulatory role in oil and gas development on the reservation. Both of the earlier cases, however, ". . . involved complete abdication or noninvolvement of the State in the on-reservation activity." [25]

The New Mexico Supreme Court did not apply the analysis of *Cotton Petroleum* here; it changed it. In the

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[23] *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176 (1989) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1989)).

[24] *Id.* at 176-77.

[25] *Id.* at 185.

instant case, as in *Ramah* and *Bracker*, "the State was 'unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on bureau and tribal roads within the reservation.' " [26] To avoid this deficiency, the State Supreme Court ruled that *Cotton Petroleum* had intentionally modified the elements of Indian preemption analysis by dispensing with the requirement in *Bracker* and *Ramah* that the State identify a regulatory function or service related to the activity being taxed (App. 10a).

Nothing in *Cotton Petroleum* supports that conclusion. To the contrary, the Court went to great lengths to distinguish the facts in *Cotton Petroleum* from those in *Ramah* and *Bracker* by describing the specific regulatory functions and services the State provided to the particular activity it was seeking to tax.

Moreover, the State Supreme Court has held that under *Cotton Petroleum*, the State's general interest in raising revenue for the common good is sufficient to sustain a tax (App. 12a). However, in both *Bracker*, 448 U.S. at 151, and *Ramah*, 458 U.S. at 845, this Court expressly ruled that a generalized state interest in raising revenue is insufficient to justify State taxation of on-reservation activity in which the State provides neither regulation nor service. Nothing in *Cotton Petroleum* overturned those holdings.

If the New Mexico Supreme Court's ruling is permitted to stand, a state will have a valid interest in every case under the Indian preemption analysis, since every state has a generalized interest in raising revenue. Clearly, the decision in *Cotton Petroleum* does not support the conclusion that states are henceforth relieved of any need to demonstrate their particularized interests as part of the Indian preemption analysis. To the contrary, in that decision the Court analyzed the State's particularized interest

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[26] *Ramah*, 458 U.S. at 184 (quoting *Bracker*, 448 U.S. at 150).

at great length. Therefore, this Court should grant *certiorari* in order to correct this significant undercutting of the preemption analysis.

The New Mexico court's misreading of *Cotton Petroleum* also conflicts directly with the federal court of appeal's ruling in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 449 U.S. 1055 (1990). In that case, the Ninth Circuit held that *Cotton Petroleum* had reaffirmed the basic principle of *Bracker* and *Ramah* that a state's general interest in revenue collection is insufficient to outweigh specific federal and tribal interests, where the state tax bears no relationship to the on-reservation activity being taxed.[27]

The burdens and inconsistencies outlined above must be considered in light of the fact that the State had no role whatsoever in the planning, construction or regulation of on-reservation roads. Blaze built these roads for the benefit of the tribes, with tribal labor, using tribal resources, on tribal rights-of-way. These factors demonstrate that the gross receipts tax is preempted by federal Indian laws, regulations and policies. The New Mexico Supreme Court sought to escape such a result by a misinterpretation of *Cotton Petroleum* that radically alters the elements of Indian preemption analysis as applied to state taxation of on-reservation activity.

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[27] 881 F.2d at 660-61. The requirement that the state tax bear some relationship to the activity being taxed does not mean that there must be a proportional quid pro quo between state on-reservation services and the amount of tax, but only that the state play a role in regulating or otherwise providing services to the on-reservation activity. The relationship requirement defines a threshold the state may cross by showing that it provides significant regulatory or other support for the activity being taxed. *See Cotton Petroleum*, 490 U.S. at 185.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted,

Respectfully submitted,

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